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Consolidated Gold Fields, PLC v. Minorco, S.A.: The Growing Over-Extension of United States Antitrust Law

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NOTE

CONSOLIDATED GOLD FIELDS, PLC V. MINORCO, S.A.: THE GROWING OVER-EXTENSION OF UNITED STATES ANTITRUST LAW

Jacqueline B. Berman*

INTRODUCTION

As the number of antitrust cases grows, so does the United States judiciary's application and expansion of antitrust law. The Second Circuit's decision in *Consolidated Gold Fields, PLC v. Minorco, S.A.*[1] is a prime example of this expansion. In this case, the Second Circuit used inapplicable antitrust principles to gain jurisdiction over a foreign merger. The case, in which a British target company attempted to stop a Luxembourg-based company's hostile takeover,[2] raises important an-

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1. Consolidated Gold Fields, PLC v. Anglo American Corp., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part rev'd in part*, Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (*on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989)). This case concerns a foreign target company, Gold Fields, and its partially-owned subsidiary's desire to seek a preliminary injunction against a foreign corporation's (Minorco) hostile takeover. *Id.* at 490. Despite defendant Minorco's assertion of lack of jurisdiction, it did appear before the United States court to defend its case. 698 F. Supp. at 493.

2. *Id. Consolidated Gold Fields* is an interesting and unusual case because, unlike most other international or domestic antitrust suits, it involved a tender offer in the market of a scarce, precious commodity. *Id.* This factor appeared to be important in determining the outcome of the case. *See Consolidated Gold Fields*, 698 F. Supp. at 501 (distinguishing gold from other commodities because of its homogeneous and limited nature). For these reasons and because start-up costs for entry into the market are extremely high, the gold market appeared to the court to be a prime candidate for monopolization. *Id.* This case can also be distinguished from most other antitrust cases because a target company, who might conceivably benefit from the transaction, sought an injunction rather than the more typical competitor claiming antitrust injury due to a decrease in competition. *Consolidated Gold Fields*, 871 F.2d at 252.

titrust questions regarding the applicability of United States antitrust law to foreign entities.

In the jurisdictional context, *Consolidated Gold Fields*[3] represents the United States' infringement on the sovereignty of other nations through the use of its antitrust laws. This infringement is made more serious by the rapid increase in transnational ownership of securities and the increase in international mergers and acquisitions.[4] Additionally, the increase in the number of applicable antitrust laws of other nations involved in such transactions will ultimately lead to further jurisdictional conflicts.[5]

In an antitrust context, the potential for conflict between foreign nations and the United States will increase as transnational economic activity continues to grow.[6] It is in the United States' best interest to ease these tensions,[7] because by imposing its law on other countries, the United States threatens the free flow of goods and capital intended to benefit the world economy.[8] In order to minimize this possibility, United States courts should exercise care in cases involving significant foreign interests.[9] The court's treatment of standing in *Consolidated Gold Fields* also raises important issues about who can bring a lawsuit under United States antitrust law.[10] The Congress, in developing antitrust law,[11] intended to regulate monopolies in order to preserve a high

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3. *Id.* The Second Circuit's opinion did not address the justification for jurisdiction over the foreign tender offer and failed to offer a comity analysis in the antitrust section as it did in the securities law section of the case. *Id.*

4. *See* Callcott, *Application of U.S. Law to Foreign Transactions—Antitrust Law—Securities Law: Consolidated Gold Fields, PLC v. Minorco, S.A.*, 83 AM. J. INT'L L. 923, 927-29 (1989) (supporting the theory that the *Consolidated Gold Fields* ruling infringes on foreign nations' sovereignty and stating that foreign investors' acquisitions are commonplace and will continue to multiply as the European Community's barriers dissolve).

5. *Id.* at 928.

6. *Id.* at 929. The United States has stricter standards, relative to other countries, for finding market concentration. *Id.* Nations have objected to the United States' unwillingness to allow the degree of market concentration which is acceptable in most other countries of the world. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See generally* E. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS (1988) (explaining the various considerations for determining antitrust standing cases). Standing requires a nexus between the injury to the plaintiff and the antitrust violation. *Id.* at 39.

11. *See generally* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982); Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52, 53 (1982) (serving as the foundation for the United States antitrust laws). A summary of the antitrust acts relevant to this casenote are as follows:

The Sherman Act: Section one of the Sherman Act prohibits conduct resulting in the unreasonable restraint of "trade or commerce with foreign nations." 15 U.S.C. § 1

level of competition, which benefits society by encouraging price competition, leading to lower priced goods and services.[12] With these goals in mind, Congress limited standing to those injured by non-competitive actions.[13]

In *Consolidated Gold Fields*, the Second Circuit exceeded its authority by granting the target company standing in the absence of a showing of an antitrust injury. Such a decision conflicts with the Congress' intent that there be a showing of antitrust injury.[14] Should other courts adopt the Second Circuit's position that a target need not demonstrate antitrust injury, then United States antitrust law will lose some of its credibility and impact.

This note discusses three of the issues posed by *Consolidated Gold Fields*: personal jurisdiction, prescriptive jurisdiction, and standing. Part I provides a historical background of the case. Part II discusses the requirements for personal jurisdiction, and asserts that the Second Circuit erred in exercising jurisdiction over Minorco.[15] Part III explores several approaches to prescriptive jurisdiction and concludes that the Second Circuit should have refrained from exercising extraterritorial jurisdiction over Minorco because of comity considerations.[16] Part

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(1982). *See generally* Griffin, *United States Antitrust Laws and Transnational Business Transactions: An Introduction*, 21 INT'L LAW. 307, 310 (1987) (explaining the foundations of the Sherman Act). Congress created this act to regulate interstate and foreign commerce. *Id.* The Supreme Court in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944), interpreting the Sherman Act, found that Congress intended to use its power under the Constitution to the utmost extent in restraining trade and monopolies. *Id.*

Congress amended the Sherman Act in 1982 to clarify and limit its application with regard to export commerce and exclusively foreign transactions. *Id.* A foreign transaction cannot be challenged under the amended Sherman Act unless the transaction is likely to have a "direct, substantial and reasonably foreseeable effect" on United States domestic or import commerce or on United States export trade of an entity involved in such trade within the United States. 15 U.S.C. § 6a (1982).

The Clayton Act, Section 7: This section of the Clayton Act forbids the acquisition of the stock or assets of a party where the acquisition's effects may act "substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18 (1982). The potential anticompetitive effects must occur within the United States and, thus, anticompetitive effects resulting from a merger which exist outside of the United States are not subject to the constraints of the statute. Griffin, *supra*, at 31.

12. *See* Griffin, *supra* note 11, at 307 (stating that competition leads to lower prices, more technological innovation, and the best allocation of economic resources).

13. *See* E. SULLIVAN & J. HARRISON, *supra* note 10, at 39 (citing Blue Shield of Virginia v. McCready, 457 U.S. 465, 477-78) (noting that it was likely that Congress intended a person to have suffered an antitrust injury in order to attain standing).

14. *Id.*

15. *See infra* notes 37-65 and accompanying text (discussing the issue of personal jurisdiction).

16. *See infra* notes 66-123 and accompanying text (discussing the issue of prescriptive jurisdiction).

IV presents the requirements for antitrust standing and criticizes the finding by the Second Circuit that Minorco suffered an antitrust injury.[17] Part V recommends that courts apply stricter standards for asserting personal jurisdiction, that they simplify the analysis for determining the existence of prescriptive jurisdiction, and that they apply a heightened standard of scrutiny for determining antitrust injury. Through these analyses, this article will show that the Second Circuit failed to consider the sovereignty of foreign nations and improperly applied United States law. Courts should exercise greater care in deciding issues of jurisdiction and standing in future cases.

I. HISTORICAL BACKGROUND

Consolidated Gold Fields is a complex case with multiple parties, but which can be summarized by simply stating that Minorco made a hostile takeover bid for Gold Fields. The plaintiffs are Consolidated Gold Fields (Gold Fields), a British corporation which exports, mines, and sells natural resources, primarily gold,[18] and Gold Fields Mining Corporation (GFMC), Gold Fields' wholly-owned subsidiary.[19] The crown jewel of Gold Fields' assets is its ownership of almost half of Newmont Mining Corporation (Newmont),[20] which, in turn, owns the majority of Newmont Gold Company (Newmont Gold).[21] Minorco is a holding company[22] incorporated in Luxembourg that is largely controlled by Anglo American Corporation of South Africa, Ltd. and De Beers Consolidated Mines, Ltd.[23] The Minorco group is the largest

17. *See infra* notes 124-68 and accompanying text (discussing the issue of target standing).

18. *Consolidated Gold Fields*, 871 F.2d at 255. Although Gold Fields is a British corporation, half of Gold Fields' assets are located within the United States. *Id.*

19. *Id.*

20. *Id.* Gold Fields owns 49.3% of Newmont Mining Corporation (Newmont). *Id.*

21. *Id.* Newmont, incorporated in Delaware and headquartered in New York, owns 90% of Newmont Gold Company (Newmont Gold), the largest gold producer in the United States. *Id.* Furthermore, Gold Fields and its associated companies, including Newmont, make up the second largest gold producer in the western world. *Id.* Gold Fields owns a substantial number of shares in the three gold mining companies: It has a 49% interest in Newmont; a 38% interest in Gold Fields; and a 49% interest in Renison. Brief of Defendant-Appellant, Cross-Appellee Minorco at 7, Consolidated Gold Fields v. Minorco, 871 F.2d 252 (2d Cir. 1989) (No. 88-7932 (L),-7934) [hereinafter Brief of Defendant-Appellant, Cross-Appellee Minorco].

22. *Consolidated Gold Fields*, 871 F.2d at 255. The majority of Minorco's shareholdings are in companies which produce and export natural resources. *Id.*

23. *Id.* Anglo American and De Beers are both South African companies. *Id.* Anglo American has a 39.1% interest in Minorco and De Beers has a 21% interest. *Id.* In addition, the South African Oppenheimer family has a 7% interest in Minorco and allegedly controls Anglo American, De Beers, and Minorco. *Id.* Anglo American participates in extensive gold mining operations. *Id.* In addition to these interests, the Op-

non-communist producer of gold in the world[24] and owned almost thirty percent of Gold Fields before the proposed merger.[25]

In October 1988, Minorco began negotiations for the purchase of Gold Fields' stock. A small portion of the stock was owned by United States residents.[26] In its purchase offer, Minorco made a concerted, overt effort to avoid all contacts with the United States in order to prevent American courts from applying United States antitrust laws.[27]

Despite this attempt, Gold Fields, Newmont and Newmont Gold sued for a preliminary injunction[28] in district court.[29] The takeover

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penheimers have a large number of family members on the boards of the companies involved in this action. *Id.*

24. *Id.* Minorco holds a 20.3% concentration in the non-communist gold production market. *Id. See* Brief of Defendant-Appellant, Cross-Appellee Minorco, *supra* note 21, at 11 (explaining that gold is supplied to world markets from several sources, including non-communist mine production, official reserves, scrap recovery, private investors, and centrally-planned economies). Mine production from non-communist sources supplies a very small fraction of the world's gold. *Id.*

25. *Consolidated Gold Fields*, 871 F.2d at 255.

26. *Id.* United States residents owned 2.5% of the outstanding stock. *Id.* Minorco attempted to buy 213.4 million shares, 5.3 million of which were owned by United States residents. *Id.* Only 50,000 of these shares were directly owned by residents, the remaining shares were held through nominee accounts in the United Kingdom (3.1 million) and through the ownership of American Depository Receipts (ADR) (2.15 million). *Id.*

27. *Id.* at 256. *See* Brief of Defendant-Appellant Cross-Appellee Minorco, *supra* note 21, at 45-49 (stating that Minorco intentionally took every precaution to avoid any announcement or other publicity of the tender offer in the United States). Minorco, in its offering documents, stated that the offer was not going to be made directly or indirectly "by use of the mails or by any means or instrumentality of interstate or foreign commerce or of any facilities of a national securities exchange of the United States of America, its possessions or territories or any area subject to its jurisdiction or any political sub-division thereof." *Consolidated Gold Fields*, 871 F.2d at 256. The press release about the offer stated, "[n]ot for distribution in the United States," and the offering materials stated that the offer did not extend to Gold Field's American Depository Receipts. Brief of Defendant-Appellant Cross-Appellee Minorco, *supra* note 21, at 45.

Minorco provided United States shareholders offering documents through United Kingdom nominees. *Consolidated Gold Fields*, 871 F.2d at 256. Minorco stated in its offering documents that it would accept tender offers from United States residents only if the acceptance form was mailed from outside of the United States. *Id.* Furthermore, Minorco did not participate in any oral or written communications with American media and there were no direct communications between Gold Fields' ADR holders and Minorco. Brief of Defendant-Appellant, Cross-Appellee Minorco, *supra* note 21, at 44. Despite these actions, the district court still claimed personal jurisdiction over Minorco. *Consolidated Gold Fields*, 698 F. Supp. at 496. The Second Circuit agreed and stated that the results of these actions outside of the United States had a foreseeable impact on events inside the United States and, therefore, the exercise of jurisdiction was valid. *Consolidated Gold Fields*, 871 F.2d at 262.

28. *See Consolidated Gold Fields*, 698 F. Supp. at 503 (citing Savage v. Gorski, 850 F.2d 64, 67 (2d Cir. 1988); Jackson Dairy v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (providing the criteria for the granting of preliminary injunctions). Courts will grant a preliminary injunction provided that the plaintiffs prove (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently

would have resulted in Minorco acquiring substantial control of the non-communist gold production market.[30] The court granted the plaintiffs' requested injunction, thereby preventing Minorco from proceeding with its tender offer.[31] The court concluded that while Minorco did not satisfy the requirements for general jurisdiction, it did meet the criteria for specific jurisdiction because Minorco purposely directed its takeover offer to purchase Gold Fields at residents in the United States, including shareholders and Newmont.[32] The court also held that even though Newmont and Newmont Gold had met antitrust standing requirements under the Clayton Act, Gold Fields and GFMC did not suffer the injury necessary to attain standing, and in fact, would have the opportunity to reap enormous benefits as a result of the increased market power.[33] Thus, the district court denied them standing on the antitrust claims.[34]

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serious questions regarding the merits which would make them fair to litigate along with hardships of the party asking for the injunction. *Consolidated Gold Fields*, 698 F. Supp. at 493.

The court in this case found that Newmont and Newmont Gold satisfied these requirements because the proposed takeover would result in Gold Fields' substantial control of the market. *Id.* at 503. Any takeover that results in a 30% or higher control of the market is considered to have a prima facie negative impact on competition. *Id.* at 495-97. Thus, the court found that Newmont and Newmont Gold demonstrated a likelihood of success on the merits. *Id.* Additionally, the court held that plaintiffs demonstrated irreparable harm because it is impossible to "unscramble the eggs" subsequent to a takeovers' consummation. *Id.* Furthermore, plaintiffs satisfied the minimum requirements for sufficiently serious questions regarding the merits because plaintiffs could face imminent harm from a decrease in competition in the world gold market resulting from the takeover. *Id.*

29. *Consolidated Gold Fields*, 698 F. Supp. at 489-90 *citing*, among other statutes, violations of the Securities Exchange Act, 15 U.S.C. § 78(b), the Clayton Act, 15 U.S.C. § 18 (1988), the Sherman Act, 15 U.S.C. §§ 1, 2 (1982).

30. *Id.* at 503

31. *Id.* at 503-04.

32. *Id.* at 496; *see also infra* notes 38-39 and accompanying text (stating that in order to confer general jurisdiction, defendant's contacts must be systematic and continuous). *See also infra* notes 40-42 and accompanying text (stating that in order to prove specific jurisdiction, plaintiff must prove that defendant purposefully directed the disputed activities toward the forum).

33. *Id.* at 499-500. The district court held that Gold Fields' and GFMC's claims were meritless because they found it was illogical to assume that these parties would face any injury due to the company's increased market power. *Id.* at 499. Additionally, the court stated that Gold Fields' argument that it would suffer harm derivatively from the independent companies that it partially owned was counter-intuitive. *Id.* Gold Fields would no longer exist to feel the consequences of anticompetitive practices. *Id.*

34. *Id.* at 499. In addition, the court held that the fraud claims, alleging that misstatements in the tender offer might mislead United States investors, lacked prescriptive jurisdiction. *Id.* at 496-97. When applying federal securities law to the international transaction, the court applied the "conduct test" and the "effects test." *Id.* at 496. The conduct test considers the nature of the conduct occurring within the United States related to the claimed fraudulent activities. *Id.* Under this test, the court held

The Second Circuit addressed neither the disputed claims conferring personal jurisdiction to Minorco nor the conflicts concerning the grant of prescriptive jurisdiction to Minorco.[35] It did, however, grant antitrust standing to Gold Fields and Newmont Gold under the Clayton Act.[36]

II. PERSONAL JURISDICTION

The Second Circuit's analysis in *Consolidated Gold Fields* raises issues regarding the jurisdictional requirements for the extraterritorial application of United States antitrust laws.[37] In order for a defendant to be subject to general jurisdiction, there must exist a relationship between the defendant, the forum, and the claim.[38] If such a relationship does not exist, the defendant's contacts must be systematic and continuous.[39] Two elements must be established in order to assert specific personal jurisdiction over a foreign party in an antitrust case.[40] First,

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that Minorco did not partake in more than incidental activities relating to this fraud, assuming such claims were valid. *Id.* Although the court found there was sufficient contact between Minorco and United States residents to grant personal jurisdiction, the alleged fraudulent statements did not occur within the course of those contacts. *Id.*

When applying the effects test, the court found that because Americans held only 2.5% of the shares in question and Minorco avoided any contact with the United States with regard to the purchase of these shares, the effect of the alleged fraud in connection with the transaction was too minimal to confer standing. *Id.* at 496-97. In this decision the court stated that "[w]e cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if [an American citizen] in London had defrauded a British investment trust by selling foreign securities to it simply because half of one percent of its assets was held by Americans." *Id.* at 496-97 (quoting ITT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975)). Thus, the fact that an insignificant number of Americans owned the stock is not sufficient to confer prescriptive jurisdiction for the securities claims. *Id.*

The Second Circuit reversed this decision when it held that plaintiffs did in fact have prescriptive jurisdiction for the securities claims. 871 F.2d at 263. This note will not address the validity of the securities law holding, as it pertains exclusively to the antitrust claims contained in this case.

35. *See generally Consolidated Gold Fields*, 871 F.2d 252 (showing that the court failed to address jurisdictional concerns which the parties argued on appeal).

36. *Id.* at 260.

37. *See Consolidated Gold Fields*, 698 F. Supp. at 493-94, 497 (discussing requirements for personal jurisdiction and general jurisdiction). When transactions involving a foreign corporation's potential antitrust violations, such as in *Consolidated Gold Fields*, are raised in United States courts, the court must first establish personal jurisdiction. *Id.* at 493. If personal jurisdiction is granted, then the court must determine whether it should hear the case based on the chance for its success on its merits. *Id.* at 493-94.

38. *Id.* at 493.

39. *Id. See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (establishing the standards for the "long arm" application of personal jurisdiction).

40. *Consolidated Gold Fields*, 698 F. Supp. at 496.

the plaintiff must show that the connection between the defendant and the United States is the result of the defendant's purposeful, directed actions toward the United States.[41] Second, the plaintiff must show that the antitrust injury arose out of the defendant's contacts with the United States.[42] The Second Circuit's assertion of in personam jurisdiction over Minorco is questionable because, as Minorco protested in district court, its ties with the United States were minimal.[43] Notwithstanding the fact that Minorco argued the issue, the court of appeals did not address personal jurisdiction in its opinion.[44]

A. THE DISTRICT COURT'S BASIS FOR GRANTING PERSONAL JURISDICTION

To find personal jurisdiction, the district court first inquired as to Minorco's qualifications for "general jurisdiction."[45] The court considered the sufficiency of Minorco's contacts with the United States and held that Minorco had insufficient contacts to warrant the exercise of general personal jurisdiction.[46] The court reasoned that Minorco's contacts were insufficient because Minorco was not licensed to do business, nor did it have an office, in the United States.[47] Notwithstanding its

41. *Id.* In Keeton v. Hustler, the Supreme Court found the Due Process requirement satisfied, that fair warning had been given, "if the [out-of-forum] defendant had purposefully directed his activity to residents of the forum." *Keeton*, 465 U.S. 770, 774 (1984).

42. *Id.* In Helicopteros Nacionales de Columbia S.A. v. Hall, the Supreme Court required a claim be "related to or 'arise[] out of' a defendant's contacts with the forum." *Helicopteros Nacionales*, 466 U.S. 408, 414 (1984).

43. *See* Brief of Defendant-Appellant, Cross-Appellee Minorco, *supra* note 21, at 43 (arguing that Minorco had insufficient ties with the United States to confer jurisdiction over it).

44. *Consolidated Gold Fields*, 871 F.2d at 255. The court does not discuss jurisdictional issues in its summary of its holding. *Id.*

45. *Consolidated Gold Fields*, 698 F. Supp. at 493-94. *See supra* note 38 and accompanying text (discussing jurisdictional requirements).

46. *Consolidated Gold Fields*, 698 F. Supp. at 493. Independent of the validity of prescriptive jurisdiction, a court must decide whether it can lawfully assert judicial authority over specific entities. Griffin, *supra* note 11, at 321. If a defendant is not subject to personal jurisdiction of the court, no civil action can proceed. *Id.* Under the Due Process Clause, the Supreme Court established that when a defendant is not present in a forum's territory, "minimum contacts" of a certain nature and quality must exist in order not to offend notions of "fair play and substantial justice." International Shoe v. Washington, 326 U.S. 310, 316 (1945). In applying the minimum contacts test, courts determine whether it is fair and reasonable to demand that a party defend itself in the forum, and whether the defendant engaged in an action that was purposely directed at the forum. Griffin, *supra* note 11, at 321-22, *citing International Shoe*, 326 U.S. at 316.

47. *See Consolidated Gold Fields*, 698 F. Supp. at 494-95 (expanding on the notion of no minimum contacts with its United States forum). Minorco is not registered

denial of personal jurisdiction, the district court justified the exercise of specific personal jurisdiction over Minorco because of Minorco's intermittent relationship with Newmont over a period of seven years, including meetings in the United States which were likely related to the takeover of Minorco.[48] When applying a traditional in personam jurisdictional test, it appears that the district court unjustly asserted in personam jurisdiction over Minorco because Minorco's contacts with the United States were not systematic and continous and because there was no nexus between the actual tender offer regarding Gold Fields and any forum in the United States.[49]

B. THE COURT OF APPEALS' FAILURE TO ADDRESS PERSONAL JURISDICTION

On appeal, Minorco argued that the district court erroneously exercised specific jurisdiction over it because Newmont's claim satisfied neither of the elements required.[50] The first element was not met because there was no purposeful contact between Minorco and the United States in connection with Minorco's attempted takeover of Gold Fields.[51] Minorco contended that mere foreseeability or awareness that United States residents would be affected was not an adequate standard upon which to confer personal jurisdiction.[52] Furthermore, Mi-

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on any United States stock exchange and the trading of its stocks through American Depository Receipts is not a result of any act by Minorco itself. *Id.* at 494.

48. *Id.* at 494-95. The court asserted specific personal jurisdiction because it believed that Minorco knew its actions, including work with Newmont, retention of United States financial services, and financing of the merger, would have an impact on the United States. *Id.* at 495.

49. *See International Shoe*, 326 U.S. at 316 (establishing the criteria for "long arm" imposition of in personam jurisdiction as requiring systematic and continuous contact and a nexus between the action and the forum).

50. Brief of Defendant-Appellant, Cross-Appellee, Minorco, *supra* note 21, at 43-44. Minorco stated that in order to satisfy specific jurisdiction, defendant must purposely direct the activities that caused the litigation to the residents of the forum and that an act that simply has foreseeable consequences in the forum does not satisfy this requirement; there must be a substantial connection between the forum and the defendant; and the injury must be proximately caused by those contacts. *Id.* at 44. In this case, Newmont must demonstrate a substantial connection between the United States and Minorco's takeover bid, and that Newmont's antitrust injury arose from Minorco's contacts with the United States. *Id.* Minorco asserts the record does not support such a finding. *Id.* at 44-45.

51. *See supra* note 27 and accompanying text (explaining that Minorco, with respect to its offer, did not exercise any written or oral communication with the American media or with the holders of Gold Fields' ADRs).

52. Brief of Defendant-Appellant, Cross-Appellee Minorco, *supra* note 21, at 45. Minorco advocated this view even though it likely knew that the British nominee record holders and ADR's depository banks would inform American beneficial owners and ADR holders about the offer. *Id.*

norco argued that it was inappropriate to consider a third party's activities (here, the British record holders, who would forward the takeover offer to Americans) as a basis for claimed jurisdiction.[53] Finally, Minorco asserted that the second prong of the test was missing because the limited contacts with the United States were not the direct cause of the alleged antitrust injury, the takeover bid.[54]

Minorco further argued that the district court placed too great an emphasis on Minorco's contacts with Newmont,[55] instead of focusing on contacts originating from the actual tender offer.[56] The district court exercised in personam jurisdiction over Minorco, a wholly foreign entity, based on its somewhat insubstantial contacts with Newmont.[57]

The Second Circuit failed to address the question of personal jurisdiction in *Consolidated Gold Fields*. The court simply ignored the obvious jurisdictional problems inherent in any case in which the United

53. *Id.* at 46. Minorco cited Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984), in which the Supreme Court found that unilateral activity by a third person cannot be used to determine whether a defendant has sufficient contacts with a forum. *Id.*

54. *Id.* at 45-47. Minorco stated that the district court found the following to be the extent of Minorco's contacts with the United States: (1) its intermittent courtship with Newmont; (2) its use of American investment bankers in 1981; (3) its unsuccessful attempts to meet with the chairman of Newmont subsequent to the offer; (4) its filing under the Hart-Scott-Rodino Act (HSR) in connection with the secondary acquisition of the Newmont block of shares which Gold Fields owned; and (5) the plan to use Chemical Bank for the transaction. *Id.* at 46-47. Minorco asserted that these contacts were insufficient to render it subject to specific in personam jurisdiction. *Id.* at 47.

Minorco also asserted that its contacts with Newmont were irrelevant. *Id.* The action in question was the bid for Gold Fields, not Newmont. *Id.* Minorco's post-offer attempts to meet with Newmont did not constitute sufficient contacts because they had taken place merely to neutralize Newmont's response to the offer and therefore were unrelated to the claimed antitrust injury. *Id.*

Minorco's HSR filings were also irrelevant because there was no nexus between the alleged injury and the filings. *Id.* Gold Fields was required to make this filing in connection with the secondary acquisition of Newmont because of the magnitude of Gold Fields' shareholding interest in Newmont. *Id.* Furthermore, any activity with Chemical Bank regarding the financing of the transaction was not a jurisdiction-conferring contact because of the Supreme Court's decision to reject contact based on the financing of any activity. *Id.* at 48. *See Helicopteros Nacionales*, 466 U.S. 408 (1984) (holding that an alien's purchase of 80% of its helicopter fleet in the forum was insufficient basis for specific jurisdiction for a claim resulting from a helicopter crash).

55. *Id.* at 494-95. The district court emphasized Minorco's 7 years of takeover-related activity with respect to Newmont, while discounting Minorco's efforts to avoid contacts with the United States. *Id.*

56. *See* Brief of Defendant-Appellant, Cross-Appellee, Minorco, *supra* note 21, at 46-47 (stating that Minorco's pre-offer contacts with Newmont should be considered irrelevant). Minorco alleged that it had insubstantial contacts with the United States insofar as its attempted buyout of Gold Fields was concerned. *See id.* at 47 (noting that the only contact with the United States pertaining to the attempted takeover of Gold Fields was a financing arrangement with the Chemical Bank of New York).

57. *Id.*

States claims jurisdiction in a takeover bid between two foreign companies. By doing so, the Second Circuit has created a disturbing precedent through which the American judiciary may increasingly infringe upon foreign nations' sovereignty.[58]

C. GRANTING PERSONAL JURISDICTION—A POLICY CHOICE

There are a number of policy considerations judges must consider when determining jurisdictional questions,[59] especially when foreign entities are involved. A court must look at the actual controversy, weigh its impact on the forum, and consider the message it sends to other courts and to foreign entities.[60] Had the Second Circuit found that the exercise of jurisdiction over Minorco was unreasonable, the alleged violations of the tender offer still could have been litigated in foreign courts possessing substantial contacts with the parties involved.[61] Thus, the court should have considered this alternative when granting jurisdiction. Instead, the district court and the court of appeals directly infringed on the sovereignty of a wholly foreign entity.

The Supreme Court has specifically discouraged such judicial activism. In *Asahi Metal Industries v. Superior Court*, the Court held that the United States jurisdictional claims over a dispute between Chinese and Japanese entities was unreasonable, unfair, and in violation of the Due Process clause because there must be at least minimum contact between the forum and the entities.[62] The *Asahi* opinion and its mini-

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58. *See* Note, *Environmental Tectonics v. W.S. Kirkpatrick and the Act of State Doctrine: An Elusive Standard*, 5 AM. U.J. INT'L L. & POL'Y 133 (1989). [hereinafter Note, *Environmental Tectonics*] (examining the Act of State Doctrine). The court failed to address the sovereignty issue when it did not distinguish between crossing state lines and crossing national lines.

59. *See Consolidated Gold Fields*, 698 F. Supp. at 487, 493; Brief of Defendant-Appellant, Cross-Appellee, Minorco, *supra* note 21, at 43-49 (discussing the different policy options regarding the exercise of jurisdictional boundaries).

60. *See infra* note 62 and accompanying text (discussing judicial jurisdictional considerations).

61. *See Consolidated Gold Fields*, 871 F.2d at 255 (noting that Minorco was a Luxembourg corporation which owned a 29.9% stake in Gold Fields, a British corporation). Furthermore, Minorco's tender offer was aimed at outstanding Gold Fields' stock, most of which was held in nominee accounts in the United Kingdom. *Id.* Both the United Kingdom and Luxembourg, as well as other forums, had substantial contacts with Minorco, and therefore, could have litigated this matter. *Id.*

62. Asahi Metal Indus. v. Superior Court, 107 S. Ct. 1026, 1028 (1987). The Court held that minimum contact between the forum and the defendant was required in order to meet due process demands. *Id.* at 1031, *citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). The court also required a defendant to purposely expose itself to the forum out of a desire to benefit from the contact. *Asahi*, 107 S. Ct. at 1031. The Supreme Court's interpretation of the due process requirements restricts a court's power to exercise personal jurisdiction if such exercise offends notions

mum contacts requirements have not gone without criticism, however. Some scholars assert that the minimum contacts requirement is too restrictive because it limits jurisdiction based on geographic distance rather than the defendant's actual inconvenience in getting to the forum.[63] This view, however, overlooks the primary policy reason for limiting United States personal jurisdiction claims: deferrence to the sovereignty of nations and protection from bias, real and perceived, against non-American parties in United States courts.[64]

The conflict in *Consolidated Gold Fields* regarding personal jurisdiction represents the growing over-extension of United States antitrust law. In pursuing its desire to decide this case, the Second Circuit neglected consideration of Minorco's insubstantial contacts with the United States and failed to follow the Supreme Court's in personam guidelines as set forth in *Asahi*.[65] Courts should be cautious when claiming jurisdiction because it may weaken the foundations upon which the policy of personal jurisdiction stands and impinge upon the sovereignty of foreign nations.

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of fair play and justice. *Id.* at 1033, *citing International Shoe*, 326 U.S. at 316 *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940). When determining whether claims of jurisdiction offend these notions, the court must consider the burden imposed on the defendant, the forum state or nation's interests, and the plaintiff's interest in getting relief. *Asahi*, 107 S. Ct. at 1033-34. Other factors include the judicial system's interest in obtaining the most efficient form of relief and the interest in establishing sound social policy. *Id.* at 1034, *citing* World-Wide Volkswagen v. Woodson, 44 U.S. 286, 292 (1980). Furthermore, the unique burdens of a foreign entity litigating in a unfamiliar judicial system should be weighed more heavily in assessing the reasonableness of extending jurisdiction over national borders. *Asahi*, 107 S. Ct. at 1034. After assessing these factors, the court determined that, in the international context, the exercise of jurisdiction would not be equitable: The burden on the foreign defendant substantially outweighed the slight interests of the forum and the plaintiff. *Id.* at 1035.

63. *See* Weintraub, *Asahi Sends Personal Jurisdiction down the Tubes*, 23 TEX. INT'L L.J. 55, 70-71 (1988) (discussing the need to increase the ability of state courts to claim personal jurisdiction). Critics like Weintraub believe that the proper determinant of exercising personal jurisdiction should be demonstrated unfairness above and beyond simply the inconvenience of crossing territorial boundaries. *Id.* at 70.

64. *See* Note, *Environmental Tectonics*, *supra* note 58, at 133 (examining the Act of State Doctrine). *See* Kleinberg, *The Extraterritorial Application of the Antitrust Laws of the United States*, 8 HASTINGS INT'L & COMP. L. REV. 187, 194 (1985) (explaining that the Act of State Doctrine establishes that certain acts of state are valid and unchallengeable due to the concept that one nation will not "sit on the judgments" of another nation's government). This defense has been successful in claims dealing with nationalization of property, foreign policy, and public policy. *Id.*

65. *See supra* note 62 and accompanying text (providing the Supreme Court's guidelines in *Asahi*).

III. THE CASE FOR PRESCRIPTIVE JURISDICTION

Prescriptive, or "subject matter," jurisdiction allows a court to claim jurisdiction based on the issues raised by a complaint, rather than on a defendant's contact with the forum.[66] In an international antitrust case, courts must determine whether the challenged conduct involves trade or commerce with foreign nations[67] before it can ultimately decide whether prescriptive jurisdiction exists. American courts have interpreted "commerce" to mean "every species of commercial intercourse between the United States and foreign nations."[68] Thus, antitrust law applies to almost all types of commercial transactions between the United States and a foreign nation.[69]

An area of inquiry unique to the cases involving foreign parties is the issue of comity.[70] In *Consolidated Gold Fields*, neither the Second Circuit nor the district court seriously considered judgments of the European Community and British regulatory authorities, who believed that the tender offer would not have any anticompetitive effect on the relevant market.[71] Thus, both courts failed to apply the comity analysis appropriate in extraterritorial applications of United States antitrust law and required in United States securities law.[72] By not discussing the issue, the Second Circuit impliedly established that a comity analysis is unnecessary when considering the application of United States

66. *See* Griffin, *supra* note 11, at 317 (explaining prescriptive jurisdiction in the international context).

67. Sherman Act, 14 U.S.C. § 1 (1982).

68. *See* Griffin, *supra* note 11, at 318 *citing* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 7 (1824) (observing that the courts have interpreted "commerce" broadly pursuant to Congress' constitutional authority to regulate interstate and foreign commerce).

69. *See* Griffin, *supra* note 11, at 318 (noting that the antitrust laws apply to import, export, and investment transactions between the United States and any foreign nation).

70. *See* BLACK'S LAW DICTIONARY 242 (5th ed. 1979) (defining comity as a willingness to respect or to give effect to the laws and judicial decisions of another court as an act of good will).

71. *See* Callcott, *supra* note 4, at 928 (explaining the finding of foreign governments). After the district court granted the preliminary injunction, the British secretary of state for Trade and Industry requested that the bid be investigated by the Monopolies and Mergers Commission in order to evaluate potential anticompetitive effects on the strategic metals market in the United Kingdom. *Consolidated Gold Fields*, 871 F.2d at 254 n.1. Under British law, Minorco was prohibited from proceeding with the tender offer until the completion of the investigation. *Id.* On February 2, 1989, the Monopolies and Mergers Commission announced that the proposed acquisition would not violate British public interest by the imposition of anticompetitive side effects in the market. *Id.* Thus the only obstacle which stood in Minorco's way was the preliminary injunction issued and affirmed by the United States' courts. *Id.*

72. *See* Callcott, *supra* note 4, at 928-29 (discussing the need for comity principles to be applied in international antitrust cases).

antitrust law to foreign tender offers.[73] This precedent will only exacerbate existing confusion in the area and become more of a problem as the number of transnational tender offers increases.

A. THE GRANTING OF PRESCRIPTIVE JURISDICTION

Both parties in *Consolidated Gold Fields* raised the issue of prescriptive jurisdiction in their appellate briefs. Gold Fields argued that the tender offer had substantial effects on the United States market,[74] but ignored the issue of international comity.[75] Minorco indirectly addressed prescriptive jurisdiction in its attempt to defeat personal jurisdiction, since without personal jurisdiction a party cannot acquire subject matter jurisdiction.[76] The Second Circuit's failure to explore the issue of prescriptive jurisdiction establishes a precedent for ignoring the issue in antitrust suits against foreign tender offers.

B. EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW

The Second Circuit was the first federal appellate court to address international considerations in an antitrust context in the landmark case of *United States v. Aluminum Co. of America* (*Alcoa*).[77] *Alcoa*

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73. *See Consolidated Gold Fields*, 871 F.2d at 256-61 (making no mention of the need to perform a comity analysis). The court did use the principle of comity to resolve the securities law claims. *Id.* at 262.

74. Brief for Appellees and Cross Appellants at 51, n. 63, Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (No. 88-7932 (L), -7934) [hereinafter Brief for Appellees and Cross Appellants, Consolidated]. Gold Fields argued that Minorco was aware of its requirement to furnish Gold Fields' shareholders with tender share documents and that as a result of the tender offer, the price of Gold Fields' ADRs jumped significantly. *Id.*

75. *See id.* at 49-54 (making no mention of comity in its argument in support of the district court's assertion of jurisdiction over Minorco).

76. Brief of Defendant-Appellant, Cross Appellee Minorco, *supra* note 21, at 43-49. *See* International Shoe v. Washington, 326 U.S. 310, 319 (1945) (explaining that there can be no in personam jurisdiction if a defendant has no contacts with the said jurisdiction). Thus, in the absence of personal jurisdiction, prescriptive jurisdiction is irrelevant. *Id.*

77. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Prior to this decision, courts relied on American Banana v. United Fruit, 213 U.S. 347 (1909), in which the Supreme Court held that the Sherman Act did not apply to activity occurring outside of the United States. 213 U.S. at 357-58. In the Court's opinion, Justice Holmes stated that the imposition of the Sherman Act upon foreign activity would be unjust because it would interfere with another sovereign country's authority. *Id.* at 356. The Court also adopted the position that the determination of the lawfulness of an entity's act should be determined by the country in which the act occurred. *Id.*

It is not surprising that the ramifications of *American Banana* were limited because it did not address the possibility that foreign transactions could have effects within the

enunciated an "effects test" of prescriptive jurisdiction under antitrust laws.[78] Under the effects test, the United States has prescriptive jurisdiction over foreign activities if the alleged violative conduct is intended to have effects in the United States.[79] As later sections will address, other courts have found the effects test overly expansive and have developed alternative tests that incorporate comity considerations.[80] The Second Circuit ignored these alternative tests and in fact ignored the entire issue.

C. Approaches to Weighing Foreign Considerations for Prescriptive Antitrust Jurisdiction

1. Federal Circuit Court's Treatment

Although the federal circuits are not in agreement as to the proper test for transnational tender offers, many recognize that comity issues should be considered before extraterritorially applying United States antitrust laws.[81] The Ninth Circuit considered foreign interests in *Timberlane Lumber v. Bank of America* (*Timberlane I*).[82] The court

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United States, a possibility which grew with the internationalization of commerce. Comment, *Extraterritorial Application of U.S. Antitrust Law*, 25 Land & Water L. Rev. 177, 179 [hereinafter Comment, *Extraterritorial Application*], *citing American Banana*, 213 U.S. at 356.

78. *Alcoa*, 148 F.2d at 443-44.

79. *Id.*

80. *See infra* notes 81-123 (explaining the comity analyses used by various courts and other legal authorities).

81. *See id.* (discussing, among other things, federal courts' treatment of comity).

82. Timberlane Lumber v. Bank of America, 549 F.2d 597 (9th Cir. 1976) *remanded*, 574 F. Supp. 1453 (N.D. Cal. 1983) (*Timberlane I*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) (*Timberlane II*). This case involved a claim by plaintiffs, an Oregon partnership and two of its Honduran subsidiaries, that their operations in Honduras were paralyzed because of a judicial proceeding by defendants in Honduras. *Timberlane II*, 749 F.2d at 1379. Timberlane's allegation was that Bank of America officials, located in the United States and Honduras, attempted to stop Timberlane, via its subsidiaries in Honduras, from milling Honduran timber for export to the United States. *Id.* The Bank of America performed this alleged activity by refusing to transfer its interest in a timber enterprise in which Timberlane also had an interest. *Id.* Timberlane asserted that Bank of America did this to defend its interests in rival timber enterprises and force Timberlane out of business. *Id.* at 1380. The court found that the defendants' intent was to interfere with the American lumber business, thus affecting the United States' commerce. *Timberlane I*, 549 F.2d at 601. The court, in *Timberlane I*, held that the district court improperly dismissed the case even though the violation involved Honduran citizens, the alleged activity took place in Honduras, and its economic ramifications were felt in Honduras. *Id.* at 615. There was no indication of conflicts with Honduran law or policy or substantial interest between the United States and Honduras. *Id.*

developed the "rule of reason" test,[83] which requires the court to balance United States interests with those of other nations in deciding whether to apply United States antitrust laws.[84]

Timberlane I's facts parallel those of *Consolidated Gold Fields*; both cases involved alleged antitrust violations by foreign entities operating outside of the United States.[85] In fact, the Second Circuit used *Timberlane I* to support the comity analysis it used to address the securities law claims in *Consolidated Gold Fields*.[86] Therefore, the Second Circuit's decision not to apply the "rule of reason" test to the antitrust issues presented to it in *Consolidated Gold Fields* does not seem consistent or logical.

In *Mannington Mills v. Congoleum Corp.*,[87] the Third Circuit developed a different test for determining prescriptive jurisdiction in anti-

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83. *Timberlane I*, 549 F.2d at 613. This test is three pronged. *Id.* First, the trial court decides whether there is an effect, either actual or intended, upon United States commerce. *Id.* Second, the court evaluates whether the United States antitrust laws properly controlled the restraint of trade. *Id.* Finally, the court determines whether to assert extraterritorial jurisdiction based on international comity. *Id.*

The Tenth Circuit adopted the *Timberlane I* approach in Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981). The Tenth Circuit became the first circuit to deny extraterritorial jurisdiction under the rule of reason, or balancing, test. *Id.* at 869-70. In this case, a Canadian corporation brought suit under section four of the Clayton Act against Canadian subsidiaries of American potash producers. *Id.* at 865. Under the balancing test, the Tenth Circuit determined that the alleged violations had little effect on United States commerce while comity considerations were substantial. *Id.* at 870. Thus, the Tenth Circuit expressly indicated that a lawsuit would be dismissed when comity considerations outweighed the first two prongs of the balancing test. *See generally*, Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegal Extension of the Judicial Extension Doctrine*, 23 VA. J. INT'L L. 395, 399 (1983) (discussing the concept of international comity).

84. *Timberlane I*, 549 F.2d at 613. The relevant factors the court suggests weighing include: (1) the amount of tension which exists between United States and foreign law or policy; (2) the citizenship or allegiance of the parties and the locations or primary places of business for corporations; (3) the point at which regulation by either state may achieve compliance; (4) the relative importance of effects on the United States as compared to those elsewhere; (5) the extent to which there is express intent to hurt or adversely affect American commerce; (6) the foreseeability of such an effect; and (7) the relative significance of action within the United States as compared with action abroad. *Id.* at 614.

85. *Compare Timberlane I*, 549 F.2d at 603-05 *with Consolidated Gold Fields*, 871 F.2d at 255-56 (introducing the respective parties and verifying their foreign status and alleged activities).

86. *Consolidated Gold Fields*, 871 F.2d at 263. The court stated that it was an established principle of international and domestic law that a court can choose not to exercise enforcement jurisdiction when the remedy's extraterritorial effect is so disproportionate with the harm within the United States that it violates principles of comity. *Id.*

87. Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). This suit concerned patent infringement and fraudulent representation, and considered pat-

trust suits.[88] The Third Circuit inquires first whether there is jurisdiction, and second whether the exercise of such jurisdiction is appropriate in light of international comity considerations.[89] Although the *Timberlane I* and *Mannington Mills* tests seem similar, they are based on fundamentally different concepts. The *Timberlane I* approach looks to the establishment of jurisdiction,[90] while the *Mannington Mills* approach weighs comity considerations after jurisdiction is established in order to decide whether to enforce it.[91] The Second Circuit used *Mannington Mills* and *Timberlane I* to support the necessity of a comity analysis for the securities claims in *Consolidated Gold Fields*,[92] but extended neither case to the antitrust claims in *Consolidated Gold Fields*.[93]

In *In re Uranium Antitrust Litigation* (*Uranium Antitrust I*),[94] the district court chose not to adopt either of the above tests, but instead

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ent office activity in the United States, New Zealand, Canada, Australia, and Japan. *Id.* at 1294.

88. *Id.* at 1294-97.

89. *Id.*

90. *See* Comment, *Extraterritorial Application*, *supra* note 77, at 183, *citing Timberlane I*, 549 F.2d at 613 (noting that the three-part rule of reason test determines if prescriptive jurisdiction is present).

91. *See id.* at 184-85, *citing Mannington Mills*, 595 F.2d at 1294 (explaining that even though prescriptive jurisdiction may be present, comity considerations must still be evaluated to determine whether to assert such jurisdiction).

92. *Consolidated Gold Fields*, 871 F.2d. at 262. In addition to the tests set forth, there are various defenses that international businesses may raise when challenged under United States laws. Kleinberg, *supra* note 64, at 193. This rule has been narrowed under the Foreign Sovereign Immunities Act of 1976, which established that such immunity does not extend to litigation generated from commercial activity. *Id.* American courts have defined commercial activity broadly. *See id.* (observing that courts have determined that conduct such as a government's procurement of cement on the open market was "commercial").

Another defense is the Act of State Doctrine. *Id.* at 194. The Act of State Doctrine establishes that certain acts of state are valid and unchallengeable due to the concept that one nation will not "sit on the judgments" of another nation's government. *Id.* This defense has been successful in claims dealing with nationalization of property, foreign policy, and public policy. *Id.* Compulsion is another defense that is employed when a foreign government coerces a defendant into participating in anticompetitive behavior. *Id.* The Noerr-Pennington Doctrine, which permits parties to bring lawsuits, petition, and lobby without any threat of antitrust claims, is another defense. *Id.*

93. *See Consolidated Gold Fields*, 871 F.2d at 256-61 (ignoring comity considerations with respect to the antitrust claims). The court's inconsistency is unusual because its analysis of the securities law claims was very thorough. *Id.* at 261-63.

94. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979) (*Uranium Antitrust I*), *aff'd* 617 F.2d 1248 (7th Cir. 1980) (*Uranium Antitrust II*). *In re Uranium Antitrust Litigation* involved suits filed by Westinghouse Electric Corporation against 29 defendants. *In Re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979). Westinghouse charged that foreign uranium producers had created a cartel that attempted to force Westinghouse out of the public utilities market. *Id.*

relied on the *Alcoa* effects test.[95] The Seventh Circuit, in *Uranium Antitrust II*, modified the district court's opinion, stating that the court could not apply the jurisdictional test because the foreign defendants defaulted.[96] Thus, the Seventh Circuit has not settled the question of which prescriptive jurisdiction test it will adopt.[97] Despite the lack of a solid endorsement for a specific test, *Uranium Antitrust I* is important to the analysis of *Consolidated Gold Fields* because it demonstrates the analysis the court used in its consideration of the various prescriptive jurisdiction tests.

Another relevant international antitrust case is *Laker Airways v. Sabena, Belgian World Airlines*.[98] In *Laker Airways*, a British corporate plaintiff raised conspiracy and antitrust claims against several American and European passenger air carriers.[99] The court of appeals

95. *Uranium Antitrust I*, 480 F. Supp. at 1148; *see also supra* note 80 and accompanying text (explaining the effects test).

96. *Uranium Antitrust II*, 617 F.2d at 1255-56. This decision was limited to its facts because the defendants defaulted and their respective countries enacted legislation to prevent the enforcement of the United States' decree. *Uranium Antitrust I*, 480 F. Supp. at 1148. Thus, a balancing test regarding prescriptive jurisdiction was rendered moot because of the direct collision between the United States and the foreign countries involved. *Id.*

97. *See* Kleinberg, *supra* note 64, at 189, *citing Uranium Antitrust II*, 617 F.2d at 1255-56 (discussing the lack of resolution on foreign prescriptive jurisdiction in antitrust cases).

98. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

99. *Id.* at 916. Laker Airways (Laker) filed suit in district court, asserting that the defendant air carriers conspired to destroy Laker's inexpensive transatlantic service through predatory pricing practices. *Id.* The defendants included four American corporations, Pan American World Airways, Trans World Airlines, McDonnell Douglas Corporation, and McDonnell Douglas Finance Corporation, in addition to four foreign airlines: British Airways, British Caledonian Airways, Lufthansa, and Swissair. *Id.* at 917. The four foreign defendants filed suit in the United Kingdom's High Court of Justice in an attempt to enjoin Laker from proceeding with its antitrust claims in United States courts. *Id.* at 917-18. The High Court of Justice granted an interim injunction barring Laker from participating in the British proceedings while simultaneously seeking redress in the United States. *Id.* at 918. This injunction was intended to preserve the status quo pending the High Court's ruling on the merits of the British defendants' suit regarding the dismissal of the American suit. *Id.* The injunction, however, resulted in Laker's inability to obtain discovery or file any pre-trial motions against the British defendants. *Id.* Laker had earlier initiated a second antitrust suit in the United States District Court for the District of Columbia against KLM Royal Dutch Airlines (KLM) and Societe Anonyme Belge d'Exploitation de la Navigation Aerienne (Sabena). *Id.* Laker subsequently obtained a preliminary injunction in the district court that prevented KLM and Sabena from participating in the English proceedings and protected the district court's jurisdiction over the Laker proceedings. *Id.* The consequence of the district court's injunction was that KLM and Sabena were unable to obtain an injunction against Laker's antitrust claims in the English Courts. *Id.* KLM and Sabena appealed this injunction to the Court of Appeals for the District of Columbia. *Id.* Appellants claimed that the district court's action, which prevented

determined that concurrent jurisdiction existed for the United Kingdom and the United States based on the grounds of territoriality and nationality.[100] The court recognized the legitimacy of international comity principles, but determined that the balancing test under the "rule of reason" approach was of no help in allocating control when concurrent jurisdiction existed and in which two irreconcilable laws applied which must be resolved through political considerations.[101] The court held that the exercise of United States jurisdiction was valid due to the important United States interests involved, that the district court's preliminary injunction was necessary to preserve the court's jurisdiction, and that the injunction was not proscribed by principles of international comity.[102]

There are conflicting opinions concerning the D.C. Circuit's jurisdictional analysis in *Laker Airways*. Some legal scholars believe that the court rejected the "rule of reason" analysis,[103] while others suggest that

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appellants from taking part in Laker's antitrust suit in England, violated international comity. *Id.* at 921.

While this appeal was pending, the British secretary of state for Trade and Industry invoked the British Protection of Trading Interests Act (PTIA). *Id. See* Note, *The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645, 657 (1986) [hereinafter Note, *Laker Antitrust Litigation*] (noting that the PTIA empowered the secretary of state to issue orders prohibiting any person doing business in the United Kingdom from adhering to United States antitrust laws). Prior to the enactment of PTIA, the British High Court dissolved the previous injunctive orders, holding that United States jurisdiction was proper. *Laker Airways*, 731 F.2d at 919. This action compelled the British defendants to request an emergency appeal in which the injunctions were restored. *Id.* at 920. Laker unsuccessfully appealed this matter to the English Court of Appeals, which held that the PTIA was valid. *Id.* Ultimately, Laker's antitrust claims against the British defendants in the British courts were enjoined. *Id.*

100. *See Laker Airways*, 731 F.2d at 921 (noting that jurisdiction is universally recognized as a country's right to control activities within its boundaries). Territorial jurisdiction can also be asserted in the regulation of conduct physically contained within a territory, but whose effects are felt outside the territory. *Id.* A state can also regulate conduct that occurs outside its borders but has effects within those same borders. *Id.* at 922.

101. *See id.* at 948-49 (concluding that it was not the courts' place to weigh the purely political factors at hand). Concurrent jurisdiction exists when two or more states have legitimate interests and jurisdictional claims in a dispute. *Laker Airways*, 731 F.2d at 921. The court reasoned that the United States jurisdiction was based on the alleged conspiracy's impact on American commerce. *Id.* The court found the primary basis for the United Kingdom's jurisdiction was the nationality of the parties in Laker's complaint. *Id.* at 921-26.

102. *Id.* at 955-56.

103. *See* Klienberg, *supra* note 64, at 193; Barbolak, *Laker Airways: Recognizing the Need for a United States-United Kingdom Antitrust Treaty*, 4 DICKINSON J. INT'L L. 39, 52-55 (1985) (discussing why the court rejected the rule of reason test). Klienberg suggests that the evolution of the effects requirement over the last 40 years reflects on Congress' choice to limit antitrust law application of United States businesses. Kleinberg, *supra* note 64, at 187. Barbolak believes that because antitrust laws

the court implicitly applied the "rule of reason" analysis.[104] The very existence of such disputes underscores the important role analysis of competing interests play in determining whether United States courts should claim subject matter jurisdiction in a particular dispute. The policy issues surrounding jurisdiction should not be ignored.

2. *Department of Justice's Treatment*

The United States Department of Justice has also addressed the issue of prescriptive jurisdiction for international antitrust disputes in its *Antitrust Enforcement Guidelines for International Operations* (Guidelines).[105] The Guidelines provide that United States antitrust laws will not be applied to foreign transactions unless there is a "direct, substantial and reasonably foreseeable effect"[106] on United States com-

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reflect strong political sentiments, a bilateral antitrust treaty between the United States and Great Britain is necessary to provide antitrust guidelines. Barbolak, *supra*, at 40.

104. *See* Note, *Laker Antitrust Litigation*, *supra* note 99, at 658 (finding that Judge Wilkey's supposed rejection of the rule of reason test, when scrutinized in the case's context, is an implicit adherence to this rule). The court shifted the focus of the interest balancing analysis away from political factors and toward the suitability of injunctive relief, thereby employing the rule of reason approach in order to protect United States jurisdiction. *Id.* at 658-59.

105. *See* U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST ENFORCEMENT GUIDELINES OF INTERNATIONAL OPERATIONS 35 (1988) [hereinafter ANTITRUST ENFORCEMENT GUIDELINES] (stating that the Guidelines are designed to ensure that the Justice Department's antitrust enforcement policy will not limit non-controversial business transactions or avoid arrangements that might ultimately benefit the consumer). The Guidelines also convey the Justice Department's commitment to prosecute restraints of trade that do not benefit the consumer but that instead result in reduced output and/or higher prices. *Id.* at 35-36.

The Guidelines state that the antitrust laws are not limited solely to conduct and transactions that occur in the United States. *Id.* at 1. The Justice Department, however, recognizes that international comity considerations play a role in determining whether a foreign sovereign will recognize the United States' legislative, executive, or judicial acts within its territory. *Id.* at 31, *citing* Hilton v. Buyot, 159 U.S. 113, 164 (1895).

106. *Id.* at 29, *citing* 15 U.S.C. § 6a (1982). The Guidelines furnish a thorough explanation of the Foreign Trade Antitrust Improvement Act (FTAIA), which provides that the Sherman Act shall not apply to the export activities of American companies unless such activities have a "direct, substantial and reasonably foreseeable effect" on domestic or import trade or commerce and said effect supports a claim under the Sherman Act. *Id.* at 30. Thus, the FTAIA grants prescriptive jurisdiction over American export firms' conduct that seriously impacts American trade or commerce. *Id.* Furthermore, as a general rule, the Justice Department deems a situation involving a case in which a government pays for more than half of the cost of the transaction to have a serious impact on the United States, thereby supporting prescriptive jurisdiction. *Id.* at 30-31.

merce. The Justice Department, in its comity analysis, will investigate a foreign jurisdiction's laws when such laws are applicable.[107]

Had the Second Circuit adopted the Justice Department's approach when it analyzed *Consolidated Gold Fields*, it would have considered Britain's Monopolies and Mergers Commission's investigation of the Minorco bid which concluded that the merger would not produce anti-competitive consequences in the United Kingdom.[108] The Second Circuit should also have considered Britain's general hostility toward the imposition of United States antitrust laws on British corporations.[109] These factors should have demonstrated Britain's substantial interest in and antipathy toward the application of American antitrust laws to British entities and caused the Second Circuit to consider these issues when determining whether it was proper to apply United States antitrust law to Minorco's tender offer.

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107. *Id.* at 32, *citing* Revised Recommendation of the [OEDC] Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. C(86) 44 (Final) (May 21, 1986); Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep (CCH) ¶ 13,503. The Guidelines require the Justice Department to scrutinize, where reasonably possible, a foreign jurisdiction's interests before advocating a United States claim of jurisdiction. *Id.* The Guidelines state that United States antitrust law can be applied when actions affect United States interstate commerce, import trade or commerce, or export trade or commerce of a person engaged with the United States in trade or commerce. *Id.*

108. *See Consolidated Gold Fields*, 871 F.2d at 254 n.1 (explaining Britain's Monopolies and Mergers Commission's report on Minorco's proposed tender offer).

109. *See* Barbolak, *supra* note 103, at 55-64 (suggesting that the conflicts existing between the United States and the United Kingdom can best be remedied through the creation of a bilateral treaty). The United States' interest in fostering competition increasingly conflicts with foreign nations' resentment of such "legal imperialism". *Id.* at 56-57, *quoting* Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 FORDHAM L. REV. 399, 400 (1983). Therefore, the United States and the United Kingdom should adopt a treaty similar to the Australia-United States Agreement on Cooperation in Antitrust Matters and the Canada-United States Memorandum of Understanding with Respect to the Application of National Antitrust Laws. *See id.* at 57 (arguing that the Australian-United States Agreement and the Canada-United States Memorandum demonstrate that the tensions created by extraterritorial application of United States antitrust laws can be alleviated through international negotiations and intergovernmental arrangements).

Recommended provisions for such a treaty include: (1) intergovernment notification of antitrust law implications; (2) a consultation provision; (3) required consideration of the opposing nation's interests; (4) notification before thwarting discovery requests; (5) opinion letters from the Department of Justice; (6) limitations on United States discovery procedures; (7) government participation in antitrust suits and United States government recommendations regarding the imposition of treble damages. *Id.* at 57-63. A bilateral treaty between the United States and the United Kingdom will help terminate the "antitrust cold war" between these two nations. *Id.* at 63.

The Guidelines contain further instruction from which the Second Circuit might have benefitted. The Guidelines pose various scenarios involving international antitrust disputes, followed by the Justice Department's recommended response.[110] One scenario, remarkably similar to the facts in *Consolidated Gold Fields*, involves a merger of two foreign firms.[111] According to the Guidelines, because the extraterritorial application of American antitrust laws may create conflict with foreign nations, decisionmakers should respect those nations' interests when deciding whether to apply American antitrust law.[112] Had the Second Circuit followed the Guidelines in deciding *Consolidated Gold Fields*, it would have considered legitimate foreign interests thereby confirming the importance of the principle of comity in assessing whether to challenge Minorco's tender offer.[113]

3. *The Restatement's Treatment*

The Third Restatement of Foreign Relations Law's[114] (Restatement) approach to the application of United States antitrust laws is similar to that contained in the *Timberlane I* case.[115] Sections 402, 403, and 415 of the Restatement set forth respectively the grounds supporting the exercise of jurisdiction,[116] the principle of reasonableness in relation to

110. *See* ANTITRUST ENFORCEMENT GUIDELINES, *supra* note 105, at 37-86 (containing 18 international antitrust scenarios and the Justice Department's extraterritorial application of United States antitrust law to such scenarios).

111. *Id.* at 45-46.

112. *Id.* This does not mean that the Justice Department will never apply United States antitrust laws to completely foreign mergers that negatively affect competition in the United States. *Id.* Rather, it will consider the facts of each case in making this determination. *Id.* For example, the Department will scrutinize a merger between foreign firms if either one maintains production plants or has significant product distribution operations in the United States. *Id.* at 45-46. The Justice Department may consult the appropriate foreign governments as to their views concerning the impact of alternative remedies on the country's national interests. *Id.* at 46. Additionally, foreign firms whose assets are used to produce and sell products outside of the United States may still be required under the Hart-Scott-Rodino Act to file premerger notification with the Justice Department and the Federal Trade Commission. *Id.*

113. *See Consolidated Gold Fields*, 871 F.2d at 252 (failing to consider foreign interests when deciding to exercise jurisdiction over the tender offer).

114. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT FOREIGN RELATIONS].

115. *See* Comment, *Extraterritorial Application*, *supra* note 77, at 200 (explaining how *Timberlane I* and the Restatement's approach are similar). These approaches are comparable in that they consider comity and effects when determining the reasonableness of the exercise of jurisdiction. *Id.*

116. RESTATEMENT FOREIGN RELATIONS, *supra* note 114, § 402. Section 402 provides that, subject to section 403, a state can assert jurisdiction over: (1) activity that occurs within its borders; (2) persons or property interests located within its borders; (3) activity beyond its borders that has or is intended to have significant impact within

the exercise of jurisdiction,[117] and the foundations governing jurisdiction that are pertinent to United States antitrust law.[118] Thus, the Restatement suggests that the principal grounds supporting jurisdiction are territoriality, nationality, and the effects test, whereby a court can exercise jurisdiction over activities occurring outside of the United States if there are actual or intended effects in the United States.[119] Furthermore, the Restatement asserts that a state cannot unreasonably exercise jurisdiction even if the principal grounds for jurisdiction are present.[120] If a state can exercise jurisdiction, but such an exercise would lead to jurisdictional conflict, then the first state must balance its

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its borders; (4) conduct, interests, status, or relations of its citizens beyond and within its borders; and (5) specific activity beyond its borders by non-citizens aimed against the safety of the state or certain other state interests. *Id.*

117. *Id.* § 403. Section 403 establishes that a state may not assert jurisdiction concerning a person or activity possessing contacts with another state when the assertion of such jurisdiction is not reasonable. *Id.* Whether assertion of jurisdiction is not reasonable is decided by adjudging such factors as: (1) the activity's connection to the regulating state (i.e., the extent to which it occurs within said state or significantly or foreseeably impacts said state); (2) the links, such as citizenship, residence, or economic conduct, between the regulating state and the individual primarily responsible for the activity to be regulated, or between said state and those whom the regulation is intended to serve; (3) the type of conduct to be regulated and the significance of the regulation to the regulating state; (4) the presence of valid expectations that may be adversely or beneficially affected by the regulation; (5) the significance of the regulation to the international political, economic, or legal structure; (6) the extent to which the regulation conforms to traditions of the international legal structure; (7) whether another state may have a stake in regulating the activity; and (8) the probability of contradicting regulation existing in another state. *Id.*

Where it is not unreasonable for two states to assert jurisdiction over an individual or an activity, but the legal prescriptions issued by the two states are in conflict, each state should ascertain its interests, as well as the interests of the competing state, in asserting jurisdiction in accordance with the above factors. *Id.* A state should defer to the competing state if that state's interest is definitely more substantial. *Id.*

118. *Id.* § 415. Section 415 adapts the principles enunciated in sections 402 and 403 to United States regulation of anti-competitive activity. *Id.* comment a. Any activity or accord in the restraint of American trade that occurs substantially in the United States is subject to United States jurisdiction, regardless of the citizenship or business location of the parties to the accord or of the participants in the activity. *Id.* Any accord in restraint of American trade entered into outside the United States, and any activity or accord in restraint of such trade that occurs substantially outside the United States is subject to United States jurisdiction, if a primary goal of the activity or accord is to obstruct American commerce and such activity or accord impacts American commerce. *Id.* Any other accord or activity in restraint of American trade that substantially impacts American commerce is subject to United States jurisdiction if the assertion of such jurisdiction is not unreasonable. *Id.*

119. *Id.* §§ 402, 403, 415. *See* Comment, *Extraterritorial Application*, *supra* note 77, at 198, *citing* RESTATEMENT FOREIGN RELATIONS, *supra* note 114, § 401(a) (finding that courts can find jurisdiction through the application of the prescribing state's law to "activities, relations, or status of persons, or the interests of persons in things" by said state's legislative, executive, or judicial branch).

120. *Id.* § 403(2).

interests against the other state's interests.[121] If the state finds that the other state's interests are greater, then it should decline to assert jurisdiction.[122] The Restatement incorporates much of the effects test and international comity considerations into its analysis of the reasonableness of exercising extraterritorial jurisdiction.[123]

Had the Second Circuit followed the Restatement's approach in deciding *Consolidated Gold Fields*, it should have reviewed territorial and nationality concerns and applied the effects test. Even if the court had found prescriptive jurisdiction under these criteria, it would then have considered comity principles. Despite the 1986 Restatement revision—shortly before the Second Circuit's *Consolidated Gold Fields* opinion—the Second Circuit did not refer to the Restatement.

The Second Circuit completely ignored the extraterritorial jurisdiction analyses enunciated in the Restatement, in the Guidelines, and in a number of federal circuit court decisions. These analyses were developed to foster the principle of international comity, and by disregarding these considerations, the Second Circuit encouraged the further expansion of United States antitrust law into the domain of foreign sovereigns.

IV. THE OVER-EXTENSION OF ANTITRUST LAW BY GRANTING STANDING TO A TARGET COMPANY

Antitrust standing is based on the existence of an injury and that injury's proximity to the antitrust action.[124] In *Blue Shield of Virginia v. McCready*,[125] the Supreme Court stated that only those directly af-

121. *Id.* § 403(3).

122. *Id.* The Restatement divides conduct restraining trade into three categories: conduct in the United States, conduct outside the United States intended to obstruct American commerce and which does in fact impact American commerce, and any conduct that substantially impacts American commerce. *Id. See* Bell, *The Extraterritorial Application of United States Antitrust Law and International Aviation, A Comity of Errors*, 54 J. AIR L. & COM. 533, 569-70 (1988), *citing* RESTATEMENT FOREIGN RELATIONS, *supra* note 114, at § 415 (explaining the Restatement's approach).

123. *See* Comment, *Extraterritorial Application*, *supra* note 77, at 200 (noting that under the Restatement's approach, a court determines the existence of jurisdiction under the effects test). The reasonableness of exercising jurisdiction is adjudged through a review of the factors enumerated in § 403(2) and a determination of whether another state's interests are definitely stronger. *Id.*

124. *See* SULLIVAN, *supra* note 10, at 38 (explaining basic antitrust standing principles).

125. *See* Blue Shield v. McCready, 457 U.S. 465, 465-66 (1982) (holding that petitioner, an insurance policy holder, had the right to file suit against her insurance carrier under section four of the Clayton Act because the insurer's practice of reimbursing policy holders for psychiatric treatment but not psychological treatment represented an illegal conspiracy against psychologists in contravention of section one of the Sherman Act and this practice injured the petitioner).

fected by an alleged antitrust violation have standing to maintain an action for the recovery of treble damages for injury to their business or property.[126] The Court decided that standing exists if "there is an economic and physical nexus between the alleged violation and the harm to the plaintiff."[127] The decision in *Consolidated Gold Fields* challenges the *McCready* standing requirements by giving a target company the right to bring a claim without the antitrust violation actually causing it harm.[128]

A. Historic Application of Antitrust Standing

The United States Supreme Court established the foundation for antitrust standing in 1977 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* when it held that the threat of profit loss did not constitute antitrust injury to a competitor.[129] In *Brunswick*, the Court held that the respondents (plaintiffs below) lacked standing to pursue their claims.[130] The *Brunswick* Court emphasized that antitrust laws are designed for the protection of *competition*, not *competitors*.[131]

In 1986, the Supreme Court reaffirmed this principle in *Cargill, Inc. v. Montfort of Colorado*.[132] Under *Cargill*, a plaintiff must demonstrate that it is threatened by the type of injury that the antitrust laws were designed to protect in order to have standing for injunctive relief under section sixteen of the Clayton Act.[133] Thus, in order to evaluate

126. *See id.* at 477-78 (explaining that because neither the statute itself nor its legislative history reveal which injuries are too remote, the court would have to employ a "proximate cause" analysis).

127. *Id.* at 478.

128. *See id.* at 465-66 (discussing the requirement that only those directly affected by antitrust violations have standing to bring an action).

129. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488-89 (1977). In this case, a major bowling equipment manufacturer started to acquire a substantial number of defaulting bowling centers that would have failed had they not been acquired. *Id.* at 479-80. Competing bowling centers claimed antitrust injury under section four of the Clayton Act because they would suffer a loss of profits if the acquisitions stood. *Id.* at 480-81.

130. *Id.* at 489.

131. Note, *Antitrust Standing of Target Corporations to Enjoin Hostile Takeovers Under Section 16 of The Clayton Act*, 55 FORDHAM L. REV. 1039, 1045 (1987) [hereinafter Note, *Antitrust Standing*] *citing* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. at 489, *quoting* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

132. Cargill v. Montfort of Colorado, 479 U.S. 104, 109-10 (1986).

133. *Id.* at 113, *citing Brunswick*, 429 U.S. at 489. The Court stated that Congress has condemned mergers only when they may produce anticompetitive effects. *Brunswick*, 429 U.S. at 487. Thus, it is imperative to separate the anticompetitive effects of a merger from all other effects when evaluating the application of antitrust law. *See id.* (acknowledging that every merger can potentially result in adverse economic consequences for some competitors).

the Second Circuit's decision to grant standing to Gold Fields and GFMC, it is necessary to investigate these plaintiffs' claims and determine whether they suffered an injury and whether antitrust violations were the proximate cause of their injury.

B. THE COURTS' TREATMENT OF GOLDS FIELDS' STANDING

In *Consolidated Gold Fields v. Anglo American Corp*,[134] the district court denied standing to target Gold Fields, but granted standing to Newmont.[135] The court reasoned that Gold Fields would suffer no economic harm and would, in fact, reap economic benefits because Minorco's acquisition of Gold Fields would make Gold Fields part of a more competitive economic unit.[136] The district court's refusal to grant standing to Gold Fields was a disputed issue on appeal.

The Second Circuit modified the district court's decision and granted standing to Gold Fields.[137] The court held that Gold Fields would be threatened by antitrust injury if the merger occurred because it would be unable to compete independently in the gold production market.[138] The court also stated that the merger would cause Gold Fields to lose "one of the vital components of competition—the power of independent decision-making as to price and output."[139] This decision is questionable because the goal of United States antitrust law is to protect competition. In this case, that requires considering the competition within the gold production market. The court, however, disregarded this goal in order to protect the company from competitors.

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134. *Consolidated Gold Fields*, 698 F. Supp. 487 (S.D.N.Y. 1988).

135. *Id.* at 499. The court rejected Gold Fields' antitrust claim that, as a result of a merger, it would be compelled to defend antitrust suits and would thus suffer injury due to this result. *Id.* The court also rejected Gold Fields' claim that it would suffer antitrust injury due to Anglo's added market power, reasoning that, if anything, Gold Fields would benefit from this situation. *Id.* Additionally, the court refused to hear Gold Fields' claim that it would be derivatively harmed by the anti-competitive injury that defendants would inflict on the companies that Gold Fields partially owned because Gold Fields would no longer exist to suffer the effects. *Id.*

The court, however, agreed that Newmont and Newmont Gold would suffer antitrust injury because Anglo might halt Newmont's production in order to increase production in its South African mines to reap higher profits. *Id.* at 499-501. This would lead to higher prices for defendants. *Id.* The court also stated that Newmont would suffer injury because the proposed merger could lead to Anglo controlling approximately one-third of the non-communist world gold market, thus reducing Newmont's ability to compete. *Id.* at 499-500.

136. *See id.* at 499 (contending that it "defies logic" to believe that a company wholly owned by another will endure injury from that company's augmented market strength).

137. *Consolidated Gold Fields*, 871 F.2d at 258.

138. *Id.*

139. *Id.*

Opponents of target standing share the opinion that the injuries which Gold Fields and GFMC claimed it would suffer are not the type which antitrust laws are designed to protect.[140] Judge Altimari, who dissented in *Consolidated Gold Fields* on the issue of standing, stated that the target's loss of power to control its decision-making was not an injury sufficient to support an antitrust claim.[141] The claimed injuries were not of the type that would result from a reduction in competition. Rather, they are a natural outcome of any merger, whether the merger would result in a complete dominance of the relevant market or in only a tiny fraction of it.[142]

Section seven of the Clayton Act[143] states that anyone engaging in commerce or in any activity affecting commerce is forbidden to directly or indirectly acquire any portion of stock or other share of capital when it may result in a substantial lessening of competition, or creation of a monopoly.[144] Accordingly, courts should determine the validity of an antitrust claim on the basis of whether the proposed merger would result in anticompetitive effects that would injure the plaintiff.[145] Although a target may be significantly affected by a merger, it is unlikely that it will suffer from the merger, because it will become part of the same combination it argues will have a tremendous competitive advantage following the merger.[146]

Furthermore, the statutory language concerning the standards for injury under section four of the Clayton Act regarding injunctions is too broad to provide a precise standard to apply to these situations. This lack of a statutory standard causes circuits to differ regarding the threshold of injury required for injunctions as compared to treble damage suits. Notwithstanding these disagreements, standards within the scope of the Clayton Act's protection of competition are necessary.[147]

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140. *See id. citing* Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983); ADM Corp. v. Sigma Instruments, 628 F.2d 753, 754 (1st Cir. 1980); Carter Hawley Hale Stores v. Limited, Inc., 587 F. Supp. 246 (C.D. Cal. 1984) (noting that these decisions support the rule that a target cannot argue that it will suffer antitrust injury because following the takeover it will become a component in the same entity that it contends will have a tremendous competitive advantage).

141. *Consolidated Gold Fields*, 871 F.2d at 264.

142. *Id.* at 264.

143. 15 U.S.C. § 18 (1988). Gold Fields claimed that Minorco violated this section. *Consolidated Gold Fields*, 871 F.2d at 254.

144. 15 U.S.C. § 18 (1988).

145. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977).

146. *Id.*; *see also* Consolidated Gold Fields, PLC v. Anglo American Corp., 698 F. Supp. 487, 499 (S.D.N.Y. 1988) (finding that Gold Fields lacked antitrust standing).

147. *See Brunswick*, 429 U.S. at 488 (noting that there is no clear expression of congressional intent with respect to whether section four of the Clayton Act encompasses "all dislocations caused by unlawful mergers"); Note, *Competitor Standing*

C. DETERMINING THE EXISTENCE OF AN INJURY

Targets of hostile tender offers frequently sue unfriendly suitors in order to thwart the takeover action.[148] These targets make a variety of claims about the effect a takeover will have, including that it will impair recruitment, performance, and morale, substantially displace management, cause trade secrets to be lost, and disturb business operations.[149] These claims, while plausible securities and other legal claims, have not traditionally constituted antitrust injuries.[150] If such claims

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under Cargill, Inc. v. Monfort of Colorado, Inc: An Erosion of the Clayton Act, 37 AM. U.L. REV. 259, 262 (1987) [hereinafter Note, *Competitor Standing under Cargill*] (pointing out that the standard of proof for an antitrust injury is the same for claims under both sections four and 16); Note, *Antitrust Standing*, *supra* note 131, at 1047 (expanding on the differences between target suits for treble damages under section four versus those for injunctive relief under section 16, and supporting the general skepticism regarding target suits).

The distinction between the allowance of injunctive relief for antitrust claims under section 16 of the Clayton Act and violations under section four of the Clayton Act, which gives parties the right to sue for treble damages for antitrust violations, is in sharp dispute. *See* Note, *Antitrust Standing*, *supra* note 131, at 1042-49 (describing the divergent applications by the Supreme Court, which declined to adopt a *per se* rule, and lower courts). Although lower courts have generally applied a less rigid standard for standing under section 16 than under section four, this does not warrant an abandonment of all standing requirements which pray for injunctive relief for antitrust violations. *See also* Cargill v. Monfort of Colorado, 479 U.S. 104, 112-13 (1986) (finding that the injuries deserving relief are the same under both sections four and 16); *see also* Note, *Antitrust Standing*, *supra* note 131, at 1047 (indicating that *Cargill* recognizes that the standing analysis will not always be identical under sections four and 16).

This would defeat the Clayton Act's intended purpose: to prevent the lessening of competition. *See* Note, *Antitrust Standing*, *supra* note 131, at 1057 (finding that the Supreme Court's actions acknowledged the Clayton Act's purpose of promoting economic competition and facilitating consumer welfare). Special scrutiny should be exercised with respect to the validity of standing for target corporations that raise antitrust claims. *Id.* at 1045, *citing* Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 n.4 (2d Cir. 1981); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980); Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 288 (3d Cir. 1978); Hawaii v. Standard Oil Co., 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

148. *See* Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 114 (1986) (indicating that target management often employ lawsuits against unfriendly suitors as a tactical weapon of defense). The author's own study of management responses to hostile takeover attempts revealed that almost two-thirds of these responses involved antitrust lawsuits. *Id.* Many courts understand that these antitrust lawsuits are merely defensive weapons against hostile takeovers. *Id.* at 116. One federal district court denied a target's motion for a preliminary injunction against the suitor on such grounds. *Id.*, *citing* D-Z Investment Co. v. Holloway [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,711 (S.D.N.Y. 1974).

149. Note, *Antitrust Standing*, *supra* note 131, at 1050-51.

150. *See id.* at 1051 (contending that claims such as loss of trade secrets, disruption of corporate business, and the like do not represent antitrust injury because they do not derive from the possibility of significantly reduced competition). In D-2 Investment Co. v. Holloway, the court stated that the enforcement of these claims should be

are valid, they may not be proper for the target management to raise as a response to a hostile takeover's possible antitrust effects, because the targets may not suffer the injury of reduced competition.[151]

Furthermore, courts are often skeptical about antitrust suits brought by target management.[152] If there is a true injury to the target, then it is likely to be shared by competitors who would join in the suit against the bidder.[153] In *Consolidated Gold Fields*, however, no independent gold producers joined in the suit against Minorco.[154] This indicates that Gold Fields may have been less concerned about the antitrust implications of Minorco's tender offer than it was about protecting itself from an attempted takeover.

Target management does not always file antitrust suits in bad faith in order to entrench itself; they may actually believe that a takeover is not in the shareholders' best interests.[155] This does not appear to be the case, however, in *Consolidated Gold Fields*. The Second Circuit found that Gold Fields' standing was based on the threat of losing its "independent decision-making power as to price and output"[156] which it erroneously considered a concern of antitrust law.[157] The court confused management's desire to preserve control, prestige, wealth, and firm specific capital with shareholders' incentive to maximize wealth through investment in the target. The court indirectly admitted this conflict of interest when it stated that Gold Fields could have derived economic benefit from its combination with Minorco if it had been allowed to remain a distinct corporation within the greater Minorco aggregation.[158]

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left to the SEC or to the target shareholders. Rosenzweig, *supra* note 148, at 116, *citing* [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,711 (S.D.N.Y. 1974).

151. Rosenzweig, *supra* note 148, at 119.

152. *Id.* at 116-17.

153. *Id.*

154. *See Consolidated Gold Fields*, 871 F.2d at 252 (indicating that no independent gold producers joined in the action against Minorco).

155. Rosenzweig, *supra* note 148, at 119-20.

156. *Consolidated Gold Fields*, 871 F.2d at 258.

157. *Id.* The court misinterpreted the purpose of antitrust laws because it focused not on ease of entry into a market but instead on the loss of one competitor from the market. *Id.* Any merger can result in one less competitor in a market: the target. *Id.* This, however, has no bearing on competition in the gold production market, which should be the primary concern of this antitrust litigation. *Id. See* Note, *Antitrust Standing*, *supra* note 131, at 1051 (indicating that antitrust injury relates to injury to competition and not injury to competitors).

158. *Id.* at 258.

D. TARGET LITIGATION'S NEGATIVE EFFECTS ON SHAREHOLDERS

Whether target antitrust suits negatively effect the target shareholders' interests is a subject open to debate. When target antitrust litigation prevents potentially anticompetitve conduct it may ultimately improve the target's shareholders' interests.[159] This was likely not the case, however, in *Consolidated Gold Fields*. The Second Circuit implicitly acknowledged that Gold Fields' shareholders could have benefitted from being a distinct part of the enlarged Minorco combination.[160] By enjoining Minorco's bid, the court deprived Gold Fields' shareholders of the substantial premium they would have received.[161] Additionally, Gold Fields undoubtedly incurred substantial legal costs in battling the takeover, thus diminishing shareholder returns.[162] Furthermore, if a Gold Fields-Minorco merger is not anticompetitive, then an opportunity was lost to have a more efficient gold market, which benefits shareholders and society at large.[163]

Scholars differ as to how courts should handle the conflict that often exists between a target management's interests and those of the target itself and its shareholders in antitrust cases. Some legal scholars believe that target corporations should never be permitted to sue for damages or obtain injunctions under antitrust law because targets are never the victims of reduced competition.[164] Other legal scholars believe that restricting target litigation may be harmful because there are instances where a target corporation may suffer an antitrust injury from the merger.[165] For example, the target may suffer lost profits due to the dominant firm's manipulation of prices following the merger in order to

159. *But see* Rosenzweig, *supra* note 148, at 131-35 (contending that target litigation harms the interests of the target's shareholders).

160. *Consolidated Gold Fields*, 871 F.2d. at 258.

161. *See* Brief of Defendant-Appellant, Cross-Appellee Minorco, *supra* note 21, at 6 (noting that Minorco's initial tender offer for the outstanding Gold Fields stock it did not own was 30% greater than the average stock price for the prior six months). Minorco's bid, valued at $5 billion, was the largest in British history. *Id.*

162. Rosenzweig, *supra* note 148, at 135.

163. *See id.* at 140-43 (contending that target litigation is a tool through which target management furthers its own interests, thereby depriving society of an efficient allocation of resources).

164. Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1164 (1982). The sole purpose of antitrust law is to achieve optimal allocative efficiency of economic resources. *Id.* Standing is based on a theory of liability which depends on properly identifying a loss in allocative efficiency. *Id.* Proving antitrust injury to the target requires establishing a sufficient nexus between the above loss and plaintiff's injury. *Id.* If the nexus is not adequately established, then plaintiff cannot recover. *Id.*

165. Rosenzweig, *supra* note 148, at 144.

force weaker competitors into a "profit[s] squeeze".[166] Alternatively, the target may claim an injury where there is a threat that the post-merger entity will employ predatory pricing tactics.[167] In these cases, antitrust laws must apply. To do otherwise, would thwart the goal of United States antitrust laws.

In *Consolidated Gold Fields*, however, the Second Circuit over-extended United States antitrust law by granting standing to a target that did not suffer a direct antitrust injury.[168] The Second Circuit's decision to apply the Clayton Act outside its intended scope represents an invasion into legislative authority. Therefore, courts should not look to *Consolidated Gold Fields* as a precedent for determining the existence of an antitrust injury.

V. RECOMMENDATIONS

A. RECOMMENDATIONS FOR PERSONAL JURISDICTION—STRICTER STANDARDS

The Second Circuit's failure to conduct a thorough analysis of Minorco's claim that it had not had sufficient minimum contacts to warrant personal jurisdiction and the court's failure to incorporate principles of comity, set a dangerous predecent for resolution of international antitrust cases. There are several actions courts should consider to slow the judicial application of United States laws to foreign entities.

First, courts should develop a simple, enforceable jurisdictional standard for foreign antitrust claims, either on an international level or through rewriting current United States laws. Second, takeover targets must be subject to a higher level of scrutiny in antitrust actions. Third, United States courts should address principles of comity in their opinions, thereby creating precedent, granting due respect to the other nations involved, and reducing the potential for backlash against United States companies located in other nations.[169]

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166. Note, *Antitrust Standing*, *supra* note 131, at 1047-48.

167. *Id.* at 1048. A firm engages in predatory pricing when it prices below cost in order to eradicate competitors in the short run, thereby lessening competition in the long run. *Id.* at 1048, n.61.

168. *See* Note, *Competitor Standing under Cargill*, *supra* note 147, at 284 (1987) (warning against erosion of the Clayton Act as a result of the Supreme Court's holding in *Cargill*). *But see* Note, *Antitrust Standing*, *supra* note 131, at 1057 (concluding that *Cargill* preserves the integrity of American antitrust law by serving its ultimate purpose of fostering competition and facilitating consumer welfare).

169. *See* Brown, *The Impact of European Community Antitrust Law on United States Companies*, 13 HASTINGS INT'L & COMP. L. REV. 383 (1990) (examining the growing development of the European Community's extraterritorial application of its antitrust laws on American companies).

B. DEVELOPING PRESCRIPTIVE JURISDICTIONAL STANDARDS

The conflicts and inconsistencies seen in the cases reviewed demonstrate a need for a simplified test for exercising prescriptive jurisdiction in antitrust cases involving foreign entities.[170] These cases indicate how American courts have combined well developed substantive federal and state law with underdeveloped international law such as the principle of comity.[171] Although United States courts possess the authority to combine these two areas of law, they have neither the experience nor, often, the desire to ascertain and evaluate the interests of foreign sovereigns.[172]

It is imperative, however, that courts seriously consider all issues and potential sources of conflict in international cases in which jurisdiction is an issue.[173] The problem of jurisdictional analysis should be simplified in order to avoid vague guidelines, and to encourage such analysis so that courts will use it.[174] One solution is the creation of an international policy for asserting prescriptive jurisdiction.[175] This policy could be implemented through treaties between nations substantially affected by the extraterritorial application of antitrust laws[176] or through an international antitrust convention.

Once these international guidelines are established, they must be adequately utilized and enforced. One way to effectively enforce them is through a parajudicial device that would assist in weighing the poten-

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170. *See* Aldisert, *Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?*, 5 J.L. & COM. 415, 420-22 (1985) (discussing a variety of factors that American courts rely on in deciding whether to apply our antitrust laws extraterritorrially and the consequent need for clear guidelines on the matter).

171. *Id.* at 419.

172. *Id.* at 420.

173. Aldisert, *supra* note 170, at 424. The examination of the regulating interest should consider its legal, political, social, historical, cultural, economic, and commercial factors, as well as those of the foreign state. *Id.* at 424-25. The court should then weigh the interests of the two states. *Id.* at 425.

174. *Id.* at 425. A possible formula is:

> A state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable. Whether the exercise of jurisdiction is unreasonable is judged by identifying and weighing the considerations underlying the regulatory interests of the state seeking jurisdiction with comparable interests of the foreign state. If the interests of the foreign state are likely to be seriously injured by the assumption of jurisdiction, then the exercise of such jurisdiction is unreasonable.

Id.

175. *Id.* at 425.

176. *See* Barbolak, *supra* note 103, at 56 (expanding on the necessity for a United Kingdom-United States antitrust treaty).

tial injury to a foreign state. The applicable court could issue an order of reference to an international panel that would investigate, report, and file recommendations as to whether foreign interests would be harmed if the court assumed jurisdiction.[177] The courts then would utilize the advice of international legal experts and ease the tensions between foreign states and the United States without surrendering the court's ultimate decision-making responsibility.[178]

If a universal policy is not feasible, then the United States Congress should consider amending current antitrust laws. The new law should include a balancing test that would weigh jurisdictional antitrust considerations on the international level. The goal of the law should be to develop a simplified, consistent standard to apply to antitrust violations involving foreign entities.

Consolidated Gold Fields illustrates the growing problems of applying United States antitrust laws to transnational mergers and acquisitions. If a new standard is devised and properly applied, the United States courts will be able to make a fair case by case analysis, thus preventing outcomes such as that in *Consolidated Gold Fields*. The inconsistencies in analysis among the federal circuits must cease. In order for there to be an equitable application of antitrust law, legal experts must come to terms with these problems and shortcomings and devise a workable standard.

C. Target Standing: Judicial Discretion and Stricter Scrutiny Needed

In *Consolidated Gold Fields*, the Second Circuit over-extended United States antitrust law by granting standing to a target corporation that had not suffered any antitrust injury. A solution to the dilemma presented by the case would be for courts to employ a heightened standard of scrutiny for target antitrust claims.[179] The proper

177. Aldisert, *supra* note 170, at 430. This panel could consist of international law experts from neutral and competing states, active and retired representatives from the State Department and foreign ministers, active private international law practitioners, and active and retired judges of the World Court. *Id.* at 431.

178. *Id.* at 431.

179. *See* Note, *Standing Requirements Under the Clayton Act for Target Corporations Seeking Injunctions in Horizontal Mergers: Consolidated Gold Fields, PLC v. Minorco, S.A.*, 59 Cin. L. Rev. 615 (1990) (proposing an alternative four part test for granting target standing). Before a court grants standing it should find that the target has met four criteria: (1) the merger would be anticompetitve and result in an antitrust injury; (2) there is a causal connection between the antitrust violation and the claimed injury; (3) the target has permission to sue on behalf of third parties, especially customers, and can sue for relief along with the target. *Id.* at 637-40.

focus of inquiry should be the adequacy of the target's claim that the proposed takeover will violate United States antitrust laws based on sufficient proof of antitrust injury.[180] Thus, courts should evaluate whether the target's claimed injury is merely the natural result of a merger, or is, in fact, the type of anticompetitive injury that antitrust laws are designed to protect. Courts need to carefully analyze the facts of each case to determine whether a target benefits from the takeover, or whether it suffers antitrust injury and deserves standing to seek an injunction under the Clayton Act.[181]

Under the suggested heightened scrutiny standard, the validity of the Second Circuit's grant of standing to Gold Fields and GFMC would have been questionable. As a result of the takeover, Gold Fields and GFMC may lose their independent decision-making ability and autonomy. This, however, does not result in decreased competition due to barriers of entry to the gold market, thereby constituting antitrust injury.

CONCLUSION

Antitrust legal principles were not correctly applied in *Consolidated Gold Fields, PLC v. Minorco, S.A.* The Second Circuit failed to consider the very plausible argument that Minorco's minimal contacts with the United States vis-a-vis its tender offer were not sufficient enough for the court to assert personal jurisdiction over it. Moreover, the court did not balance United States and foreign interests as should be done when deciding whether to grant prescriptive jurisdiction in extraterritorial applications of American antitrust law. Furthermore, the Second Circuit did not exercise any discretion in granting standing to a target corporation that claimed to have suffered injuries not related to antitrust violations.

Consolidated Gold Fields demonstrates the unsettled nature of extraterritorial application of United States antitrust laws. Although current law could adequately and efficiently regulate the anticompetitive tendencies which naturally arise in an open market, the steady growth of mergers and acquisitions and transnational business activity compels the further development of safeguards and standards to prevent the over-extension of the United States antitrust laws. If American courts continue to apply the law as they did in *Consolidated Gold Fields*, such judicial activity will offend foreign entities and other parties to

180. Note, *Antitrust Standing*, *supra* note 131, at 1056.
181. *Id.* at 1057.

whom the law is applied. Thus, the adoption of stringent universal standards for the application of the United States antitrust law is necessary.